(36) (35)

No. 03-334, 03-343

SUPREME COURT, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CITIZENS FOR THE COMMON DEFENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba.

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for the Common Defence ("CCD") is an association that advocates a conception of robust Executive Branch authority to meet the national security threats that confront the nation in its war against international terrorists. The organization's name derives from the Preamble to the Constitution which recognizes that "to provide for the common defence" against foreign threats is one of the great objects of government our Constitution was meant to secure. Far from being inconsistent with "secur[ing] the Blessings of Liberty to ourselves and our Posterity," the vigorous executive power necessary to defend our nation against foreign enemies was seen by the Framers as a vital precondition to securing those blessings and an integral part of the same libertarian enterprise.

CCD's members are lawyers and law professors from across the country, most of whom served as law clerks to federal court judges or Justices of this Court, and/or as executive branch officials in the current or past Administrations. A partial list of CCD's members is included as Appendix A to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with a stark question: should the traditional understanding of habeas corpus jurisdiction be altered to permit habeas jurisdiction over foreign fighters being held by the U.S. military in its naval base at

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

Guantánamo Bay, Cuba? The answer to this question is no. If the Court—for the first time in history—interposes the federal judiciary between our armed forces and enemy belligerents held abroad, the Court will effect a dangerous and unprecedented revolution in the separation of powers and undermine the ability of the U.S. military to protect our citizens from attack.

1. This case must be analyzed under the legal framework applicable to war. Much of the criticism of the Guantánamo detentions derives, at least implicitly, from the mistaken view that the wartime legal framework is inapplicable. On the contrary, under both domestic and international law, the current global war against radical Islamist terrorist networks unquestionably qualifies as an armed conflict and triggers the full range of powers the President is authorized to employ when confronting threats to national survival.

The executive powers in question are those of the President as Commander-in-Chief, not those of the President as the nation's chief law enforcement officer. Likewise, the appropriate judicial role is measured not by the courts' traditional involvement in the administration of justice but rather by the courts' traditional non-involvement in military matters, including the use of force to subdue those the Executive concludes are enemy combatants. It would place this nation's core interests at grave risk to allow peacetime assumptions about the role and nature of judicial review to spill over into the wholly different context of war.

2. Within the legal framework of war, alien enemies held abroad receive no access to U.S. courts to seek judicial review of their detentions. *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). Among many other reasons, this rule is dictated by fundamental considerations of separation of powers and military effectiveness. See *id.* at 777-79. Even under the Geneva Conventions, to whose protections Petitioners are not entitled, neither prisoners of war nor any other class of

protected person has any right of appeal to, or judicial review by, the civilian courts of the capturing power.

A reversal or modification of this Court's holding in *Eisentrager* would mark the first time that any nation has placed its domestic legal system at the disposal of those attempting to destroy it. Such a step not only defies common sense and millennia of practice, it threatens the orderly conduct of both judicial and military processes.

That the absence of judicial review may increase the risk of error in military detentions is no argument for such review: war inevitably entails numerous risks to the lives and liberties of innocents, friend and foe alike, that would never be tolerated in other circumstances. Moreover, the risks of judicial intervention in this context must also be taken into account, and they are intolerably high. The remedies for erroneous deprivations of liberty during wartime arise from sovereign-to-sovereign negotiations, such as those now ongoing in connection with the Guantánamo detainees.

3. Petitioners and their *amici* also claim that various international legal norms should lead the Court to overrule *Eisentrager*. Their "legal" sources either do not bind the United States or create no rights enforceable in Article III courts. Their arguments are essentially political, not legal, and they invite the Court to use the flimsiest bases to recast U.S. law based upon diplomatic considerations. Rather than have this Court reduce separation of powers conflicts by avoiding rulings that "violate" binding international law as established by the political branches, they would have this Court "conform" its rulings to "international norms" that place the Court at odds with the coordinate branches charged with conducting this nation's foreign affairs.

ARGUMENT

I. THIS CASE MUST BE ANALYZED UNDER THE LEGAL FRAMEWORK APPLICABLE TO WAR.

Proper resolution of this case requires an appreciation of one fact above all others: we are a nation at war. As the attacks of September 11th vividly illustrated, the threats posed to our national security by militant Islamic terrorism are as daunting and dangerous as any we have ever faced. As in other wars, the treatment by our military of enemies encountered on the global battlefield implicates a legal framework entirely distinct from that which applies to domestic criminal law enforcement.

As praiseworthy as modern presumptions of judicial review may be with respect to criminal law enforcement or domestic administrative action, they have no place in warfare, in which society's interest in self-preservation becomes paramount. Wars have never been fought successfully, by this or any other nation, with courts passing judgment on the use of force against those the Executive identifies as the enemy. When the nation is under mortal threat, the President as Commander-in-Chief must be free to protect the nation and use all force he deems appropriate to defeat the enemy, subject only to political and diplomatic constraints. This is fully consistent with our country's liberal traditions and system of laws; indeed, it is their fundamental guarantor.

1. The factual circumstances of the attacks of September 11th and our nation's response to those attacks plainly confirm that our nation is in a state of global armed conflict against militant Islamic terrorist organizations. See Br. of Law Professors et al., in Support of Resp. United States ("Brief of Law Professors") at 3-4. In the aftermath of the September 11th attacks, the President issued a formal finding that the attacks were "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." Military Order of November 13, 2001, Detention,

Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).[2]

The determination that we are war is exclusively committed to the Executive Branch and binds this Court. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), this Court held that it is the President's prerogative to determine whether "a state of war exist[s]," *id. at* 666, such that actions authorized by the laws of war that would otherwise be impermissible may be undertaken. Because the President alone possessed the power to decide whether particular parties had assumed "the character of belligerents," this Court held that the judiciary "must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.* at 670. The President's treatment of opposing parties as belligerents was "itself official and conclusive evidence . . . that a state of war existed." *Id.*[3]

2. The President's determination that we are at war is consistent with the standards under both U.S. law and the international law of armed conflict for determining when a state of armed conflict exists. Under both bodies of law, the existence of a state of war depends upon a fact-specific inquiry into the overall intensity and nature of violence being employed. See, *e.g.*, *id.* at 666 (a conflict "becomes [a war]

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[2] NATO also took the unprecedented step of invoking the mutual defense provision of Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

[3] *See also Ludecke* v. *Watkins*, 335 U.S. 160, 169 (1948) ("[The] termination [of a state of war] is a political act."); *The Three Friends*, 166 U.S. 1, 63 (1897) (executive has absolute authority to "determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed"); *The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1871) (relying on presidential proclamations to determine start and end dates of Civil War).

by its accidents—the number, power and organization of the persons who originate and carry it on"); *Prosecutor* v. *Tadic*, 35 I.L.M. 32, 54 (Int'l Criminal Trib. of the Former Yugoslavia 1995) (state of armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" that is of sufficient intensity).

The state of war does not depend on formalities such as a declaration by Congress.[4] The vast majority of wars fought by the United States have not involved such a declaration. Nor is war limited to a conflict between two nation-states. Armed conflict with non-state actors perpetrating intense and organized violence, such as the militant Islamist terrorist groups this nation is currently fighting, also triggers the President's war powers and the legal regime associated with the use of those powers. Thus, at the outbreak of the Civil War, this Court upheld a naval blockade of the Southern states as an exercise of President Lincoln's war powers, holding that "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states." *The Prize Cases*, 67 U.S. at 666. The irregular warfare carried on against bands of Indians on the western frontier during the nineteenth century was likewise recognized as having the legal status of war, notwithstanding the fact that the Indians were not independent, sovereign

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[4] *See, e.g., Bas* v. *Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (permitting Congress to authorize exercise of war powers involving seizure of foreign vessels in the Quasi-War with France absent declaration); *United States* v. *Anderson*, 38 C.M.R. 386 (C.M.A. 1968) (recognizing Vietnam conflict as war absent declaration); U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 1, ¶ 9 (1956) ("[A] declaration of war is not an essential condition of the application of this body of law"); Existence of War with the Seminoles, 3 Op. Att'y Gen. 307 (1838) (war may exist "although no formal declaration of war has been made" and may exist even "without the sanction of Congress").

nations under classical international law. See, *e.g.*, *Montoya* v. *United States*, 180 U.S. 261 (1901); The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873); Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470 (1871). The international laws of armed conflict likewise recognize the general principle that non-state actors may engage in war and must therefore be bound by the laws of war. See, *e.g.*, Respect for Human Rights in Armed Conflict, G.A. Res. 2444, U.N. GAOR, 23d Sess., U.N. Doc. A/7433 (1968) (minimal standards of conduct set forth in common article 3 of the Geneva Conventions apply not only to governmental actors but also to "other authorities" responsible for "action in armed conflict"); *Prosecutor* v. *Tadic*, 35 I.L.M. at 54 (laws of war apply to "protracted armed violence between governmental authorities and organized armed groups").

3. That we are at war has two distinct implications for this case. The first concerns the judicial role. The President's quintessentially executive judgments here are committed to the President as Commander-in-Chief, and there are in any event no judicially manageable standards that could be applied to this uncertain context. The second is that, even if the issues in this case were justiciable, an entirely different legal regime from that applicable to domestic criminal law enforcement would apply. Cf., *e.g.*, *Middendorf* v. *Henry*, 425 U.S. 25, 49-50 (1976) (Powell, J., concurring) ("procedures in [courts-martial] were never deemed analogous to, or required to conform with, procedures in civilian courts"). This regime is validated by universal and longstanding historical practice, both in this nation and throughout the world.

At its most basic, when the President employs his Commander-in-Chief powers, as opposed to his law enforcement powers, the members of our armed forces acting at his direction violate no law when they deliberately kill others whom they perceive to be our enemies, even if their perceptions later turn out to be incorrect. The lives of

suspected enemies are taken with no necessary warning or process whatsoever, judicial or otherwise. See Ingrid Detter, *The Law of War*, 328-29, 336-39 (2d ed. 2000). Perceived enemy fighters who are not killed may be captured. No warrant need issue nor probable cause be established for these arrests. See Military Commissions, 11 Op. Att'y Gen. 297, 315 (1865). Prisoners captured by the military may be held without charge until the end of the conflict. See *id.*; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224. While being held, they receive no *Miranda* warnings and are subject to uncounseled interrogation. And if charged with war crimes, they may be tried, convicted, and put to death following military commission proceedings in which the protections of Article III, the Fifth and Sixth Amendments, and civilian judicial review do not apply. See, *e.g.*, *Madsen* v. *Kinsella*, 343 U.S. 341 (1952); *Yamashita* v. *Styler* (*In re Yamashita*), 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 10 (1942); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863); U.S. Const. amend. V. It is under this legal framework that petitioners' unprecedented claims to judicial review of their military detentions must be evaluated.

II. IN WAR, ALIEN ENEMIES CAPTURED AND HELD ABROAD HAVE NO RIGHT OF ACCESS TO DOMESTIC COURTS.

Much of Petitioners' rhetoric suggests that the government is seeking a war or emergency exception to the presumption of judicial review and the rule of law. This analysis both begs the question and assumes the wrong answer to the question it begs. Under the legal framework of war, alien enemies captured on foreign fields of battle and held by our military abroad are entitled to no judicial review, and upholding the rule of law means recognizing that the Constitution assigns the President as Commander-in-Chief the exclusive authority, subject only to diplomatic and political constraints, to identify

the enemy and determine the appropriate level and type of force to use in reducing him to submission.

A. Under *Johnson* v. *Eisentrager*, The Writ Of Habeas Corpus Is Unavailable To Foreign Enemy Combatants Held Abroad.

1. This case calls upon the Court to decide whether to overrule *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court reviewed a decision of the D.C. Circuit which had held, precisely as Petitioners now contend, "that any person, including an enemy alien, deprived of his liberty anywhere under purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations," including rights under the Geneva Conventions, "would show his imprisonment illegal." *Id.* at 767. This Court decisively rejected that proposition. Invoking "the usual disabilities of non-resident enemy aliens," the Court concluded that it could "find no basis for invoking federal judicial power in any district" over a habeas petition from an enemy alien being held abroad. *Id.* at 781, 790. As the Court explained:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

Id. at 768.

Petitioners' attempts to distinguish *Eisentrager* are unavailing. Even a casual reading of *Eisentrager* reveals that its holding did not depend on the main distinction offered by Petitioners: the fact that the *Eisentrager* petitioners were war criminals (*i.e.*, had already been convicted by a military commission) rather than preventive detainees (*i.e.*, prisoners of war or unlawful combatants who had not yet been charged). To be sure, the *Eisentrager* opinion alludes to the

petitioners' military trials and includes some discussion of issues relating to those trials. But the distinctions between types of lawful military detention played no part in the Court's reasoning. The Court simply declined "to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts," reversing the court of appeals' determination to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." *Id.* at 777, 781. Contrary to petitioners' arguments, convicted war criminals such as those in *Eisentrager*, who are suffering punitive detention and may be executed for their crimes, have a stronger—not weaker—argument for judicial review than ordinary wartime detainees like those at Guantánamo, who are, at least for the time being, merely being held out of the conflict and questioned.[5]

Petitioners' other principal attempt to avoid the holding of *Eisentrager* is based on the claim that the Court did not preclude jurisdiction but rather decided the claims before it on the merits, simply holding that relief was not available. This is not correct. The Court began its opinion by observing that "[t]he ultimate question in this case is one of jurisdiction of

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[5] Whether or not they have been adjudicated war criminals, Petitioners must be regarded by this Court as enemy aliens for the same reason the Court so regarded the *Eisentrager* petitioners: they are individuals the Executive has encountered on foreign battlefields and determined to be hostile. *See, e.g., The Prize Cases*, 67 U.S. at 670 ("Whether the President in fulfilling his duties, as Commander-in-chief . . . [chooses] to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted . . . ."). Contrary to Petitioners' suggestions, their status as citizens of friendly nations confers no immunity from being properly classified as enemy belligerents. As noted, the current war is not being fought exclusively against state actors, so enemy status is not a function of nationality but of organizational affiliation and hostile activity. Every one of the nineteen 9/11 hijackers was also a citizen of a friendly country.

civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." *Eisentrager*, 339 U.S. at 765; see also *id.* at 790 (concluding opinion by stating "we find no basis for invoking federal judicial power in any district"). The dissent understood the case the same way, observing that "[t]he Government's petition for certiorari here presented no question except that of jurisdiction" and criticizing the majority for including merits-related dicta that were unnecessary in light of the jurisdictional ruling. *Id.* at 792-93 (Black, J., dissenting).

Moreover, even if petitioners were correct that *Eisentrager* concluded only that the courts were without power to grant relief, that argument would not assist them. The policy considerations leading the Court to deny relief in *Eisentrager* apply equally if not more strongly here. See *id.* at 779. Concerns relating to the diversion of military resources, the "aid and comfort to the enemy" that would result from providing a forum for enemy belligerents to challenge our military commanders, the diversion of military and executive branch energies "from the military offensive abroad to the legal defensive at home," and the risk of "a conflict between judicial and military opinion" over the propriety of detentions are all concerns that apply whether *Eisentrager's* holding was jurisdictional or addressed the availability of relief. *Id.*

2. There is no reason to overrule *Eisentrager*. Even leaving aside the general importance of *stare decisis*, see, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 985 (1996) (plurality); *Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 854-59 (1992) (plurality), and the need to avoid creating uncertainty and instability into the legal framework governing the conduct of war while our forces are engaged in active combat across the world, the holding in *Eisentrager* is as correct today as it was in 1950. As Respondents explain, if anything, both the domestic statutory and constitutional foundations of the opinion have been strengthened during the past half-century.

In addition to its firm grounding in U.S. law, *Eisentrager*'s understanding of judicial jurisdiction is confirmed by the universal practice of states.[6] No nation at war has ever provided lawyers to its captured enemies and invited them to sue in civilian courts, especially while active hostilities are still underway. Petitioners can point to no such examples.[7] Under the international laws of armed conflict, even a *lawful* combatant may be held for the duration of the conflict with no charges, no lawyer, and no judicial process. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224; *Ex parte Quirin*, 317 U.S. at 31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing

[6] The "'traditional notions of fair play and substantial justice'" referenced by Petitioners, Al Odah Br. at 24, are, to put it mildly, out of place in military operations. The principal tradition applicable to the conduct of military operations is to kill or otherwise incapacitate the enemy with as little warning as possible.

[7] The English precedents relied upon by *amici* Legal Historians do not address applications for habeas corpus by enemy combatants detained outside the country. *See Rex* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (denying writ to prisoner-of-war held in Liverpool); *Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (same); *Sparenburgh* v. *Bannatyne*, 126 Eng. Rep. 837 (C.P. 1797) (prisoner held in England sued for payment on a contract made with the sovereign); *Sylvester's Case*, 87 Eng. Rep. 1157 (K.B. 1703) (per curiam) (person at issue was a *refugee* and "under the Queen's protection, which enables him to sue."); *Ex parte Anderson*, 121 Eng. Rep. 525 (Q.B. 1861) (non-combatant, non-wartime case involving British subject); *Ex parte Weber*, [1916] 1 A.C. 421 (habeas denied for enemy alien civilian interned in England); *The King* v. *Superintendent*, [1916] 1 K.B. 268 (same). In addition, no English precedent discussed stands for the general proposition that *de facto* control is the determinant of the Great Writ's reach. *See Rex* v. *Cowle*, 97 Eng. Rep. 587, 598 (K.B. 1759) (Writ found to extend to Borough of Berwick because "[t]he constitution [was] given to Berwick by the Crown of England, [and was] approved by Parliament."); *The King* v. *Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (writ extends to defendant *sent to* Isle of Gersey from England).

military forces."). Such a person receives counsel only if and when he is charged with a war crime. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 99, 6 U.S.T at 3392, 75 U.N.T.S. at 210.

The Guantánamo detainees, all of whom have been classified as *unlawful* combatants by the President,[8] have far lower standing and far fewer rights under the international laws of armed conflict. See *Ex parte Quirin*, 317 U.S. at 31; *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956); William Winthrop, *Military Law and Precedents* 783 (2000); Detter, *supra*, at 144; U.S. Army Field Manual, *The Law of Land Warfare*, FM 27-10, ch. 3, ¶ 80-82 (1956). Unlawful combatants include saboteurs, spies, bands of marauders, guerillas, and terrorists, and they are treated as *hostis humani generis*, or "enemies to all humankind," because their failure to follow the customs and usages of war renders their violence particularly dangerous to non-combatants. See, *e.g.*, *Ex parte Quirin*, 317 U.S. at 31-32 n.10; *United States* v. *The Cargo of Brig Malek Adhel*, 43 U.S. 210, 232 (1844); Military Commissions, 11 Op. Att'y Gen. 297 (1865). To permit such detainees to sue the President and the Secretary of Defense would be to grant them rights that even honorable enemy soldiers do not have and that no captured U.S. serviceman has ever enjoyed.

The traditional absence of judicial review of the claims of captured enemy fighters finds powerful support in the constitutional separation of powers and the preeminent responsibility of the Executive in warmaking. Not only is it essential as a practical matter for the President to be able to make decisions involving the use of force in war quickly and without hindrance, but also the courts lack the institutional

[8] *See* Press Release, White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

competence to superintend such decisions, which are intimately connected to rapid developments in intelligence, foreign affairs, and ongoing military operations.

Capture and detention of enemy combatants is a necessary incident of any military action. It constitutes a lesser use of force than dropping a bomb or firing a gun, but it is a use of force nonetheless. See, *e.g.*, *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004). And it has exactly the same basic purpose: to incapacitate those the armed forces identify as the enemy and prevent them from inflicting further harm on our citizens. See *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy.").

Decisions regarding the use of force in a war are exclusively committed to the President. "The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870). This Court has repeatedly recognized the limitations on the judiciary's ability and power to review Executive determinations related to military affairs, national security, and foreign policy.[9] The capture and detention of enemy combatants is no exception. See, *e.g.*, *The Prize Cases*, 67 U.S. at 670. See also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (per curiam) (1948) (Douglas,

[9] *See, e.g., Department of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Sumitomo Shoji Am.* v. *Avagliano*, 457 U.S. 176, 184-85 (1982); *Haig* v. *Agee*, 453 U.S. 280, 293-94 (1981); *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Terlinden* v. *Ames*, 184 U.S. 270, 288 (1900).

J., concurring) ("For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.")

It has also long been the case that enemy aliens outside U.S. territory are denied access to the U.S. court system, even if they are personally blameless in the hostilities, and even if all they wish to do is pursue ordinary civil claims. While this bar is today a function of positive law,[10] the principle "that war suspends the right of enemy plaintiffs to prosecute actions in our courts" long predates its codification. *Ex parte Colonna*, 314 U.S. 510, 511 (1942) (per curiam). This is not only a venerable rule of our common law but a staple of the law of nations. See *Eisentrager*, 323 U.S. at 776; *Masterson* v. *Howard*, 85 U.S. 99, 105 (1873); *Caperton* v. *Bowyer*, 81 U.S. (14 Wall.) 216, 230 (1871).

If ordinary citizens of enemy countries during war are disabled from suing U.S. citizens in U.S. courts to enforce commercial contracts, then unlawful enemy combatants surely cannot sue the President and the Secretary of Defense to force the military to release them. To hold otherwise would be not only to ignore unbroken historical practice but also the powerful underlying reasons why "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security." *Eisentrager*, 339 U.S. at 774-75.

[10] Section 7 of the Trading with the Enemy Act bars from the U.S. courts "an enemy or ally of enemy prior to the end of the war." 50 U.S.C. app. § 7(b).

B. Reducing The Risk Of Erroneous Detention Does Not Justify The Costs of Judicial Intervention.

Petitioners portray themselves as innocent civilians mistakenly captured by the U.S. military in the chaos of battle. They suggest that allowing habeas review would reduce the risk that innocents such as themselves are being held in error at Guantánamo. Petitioners fail to recognize that even if both premises were true—and this is far from clear given the careful and comprehensive procedures the military has put into place to ensure that it detains only those who pose a threat, see Brief of Law Professors at 17-24—judicial intervention in military detentions during time of war would still be unjustified.

1. Risks To Innocents That Would Be Intolerable In Peace Are Inevitable In War.

In war, the President is empowered to authorize the use of extreme violence against our enemies with no judicial review. Every bullet fired or bomb dropped carries with it a risk of depriving innocents, including friendly forces and civilians, of their lives with no due process whatsoever. That military detentions similarly carry risks of erroneous deprivations of liberty does not mean that such deprivations are unlawful. Nor does it argue for judicial involvement in those decisions.

Even under the familiar balancing test of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), the reason is clear: the governmental interest in detaining those it believes to be enemies and neutralizing and interrogating them is so compelling that no marginal reduction in the risk that some innocents might be temporarily detained in error could overcome it. Potentially at stake each time our armed forces capture an individual believed to be an al Qaeda terrorist is the prevention of another September 11th, or worse.

In the civilian or peacetime context, our system of justice is designed to minimize the risk of erroneous loss of life, liberty, or property. But in warfare the priorities are different. All

military operations present at least some risk of error that might be reduced by judicial review.[11] Yet in war, decisionmaking with potentially dramatic consequences for innocents caught in the crossfire is always unreviewable. For example, a long line of precedent establishes that the destruction of property belonging to non-belligerents—with no predicate beyond the order of a military commander, and no review thereafter—is a non-compensable incident of warfare. See, *e.g.*, *United States* v. *Caltex (Phil.), Inc.*, 344 U.S. 149 (1952); *United States* v. *Pacific R.R.*, 120 U.S. 227 (1887). The rule is absolute and uncompromising: "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. . . . The safety of the state in such cases overrides all considerations of private loss." *Id.* at 234. The loss of life is likewise immune from review or challenge in our courts: redress for our Navy's mistaken downing of an Iranian civilian airliner in 1988, for example, was obtained only through state-to-state negotiations. See generally 28 U.S.C. § 2680(j) ("combatant activities" exception to Federal Tort Claims Act).

This total preclusion of redress for harms incident to warfare applies even to U.S. servicemembers, who under *Feres* v. *United States*, 340 U.S. 135 (1950), and its progeny

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[11] Even in the absence of any error, severe and unredressed injury to civilians is often a direct and unavoidable collateral consequence of military action. *Cf.* United States Dep't of Def., *Report to Congress on the Conduct of the Persian Gulf War*, Appendix on the Role of the Law of War, 31 I.L.M. 612, 623 (Apr. 10, 1992) (discussing "the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects" in most contemporary armed conflicts). Indeed, under the laws of armed conflict, the military may intentionally injure even enemy civilians in significant ways, such as seizing or destroying private property or requiring financial or in-kind contributions, all without any form of pre- or post-deprivation process.

are barred from recovery under the Federal Tort Claims Act for otherwise compensable injuries sustained in the course of duty. See *United States* v. *Stanley*, 483 U.S. 669, 686 (1987); *United States* v. *Johnson*, 481 U.S. 681, 692 (1987). Any exposure of military decisionmakers to liability for the consequences of their decisions would impermissibly "implicate[] the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691; *accord Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977). Those unreviewable judgments are not limited to battlefield decisions but extend to all determinations colorably within the military command. See *United States* v. *Shearer*, 473 U.S. 52, 59 (1985).

There are no civilian analogues to the deliberate acts of violence and destruction that are the ordinary stuff of warfare. Indeed, the very notion of "collateral damage"—injuring or killing civilians or destroying civilian property without antecedent process and without compensation—is inimical to the most elementary principles of civil society. Yet in war, abbreviation or elimination of the legal process that largely undergirds civil society—and with it a risk of error that would be intolerable elsewhere—is not only acceptable but necessary to the effective conduct of hostilities.

2. The Costs Of Judicial Review Are High.

In the same way that a wartime legal framework requires us to accept higher risks of injury to innocents than would be acceptable outside of war, it also requires us to weigh more heavily the costs and burdens associated with judicial review of executive action.

In *Eisentrager*, this Court noted the serious costs associated with judicial review of military detentions of alien enemies held abroad during wartime. 339 U.S. at 779. As real and as serious as the consequences identified in *Eisentrager* are, they do not begin to exhaust the injury that would be done to the United States if captured enemy fighters held abroad by our

military were provided with lawyers and allowed to sue the President and the Secretary of Defense.

First, our military effectiveness would be degraded. Each habeas filing by a captured enemy fighter would present a public forum for making accusations against our military commanders and civilian leaders, creating irresistible opportunities to harass and embarrass, through false accusations, inflammatory or propagandistic pronouncements, or otherwise, our national leadership. Devoting military resources to defending judicial proceedings also necessarily diminishes the resources available for defending the country.

Second, in the current conflict, recognizing a right to pursue habeas corpus relief could have a disastrous impact on our ability to glean critical intelligence from those we capture. The process for which Petitioners contend would, of course, have to be extended to all similarly situated detainees—most of whom are unquestionably Taliban or al Qaeda terrorists and many of whom may possess information critical to the war effort or to preventing further mass casualty attacks in the United States. Giving each detainee access to counsel would make effective interrogation impossible. Not only would counsel advise the detainees not to answer questions from interrogators, but also the detainees themselves would be highly unlikely to cooperate knowing that they had a court case pending that might result in their freedom. In the meantime, critical intelligence, and with it our ability to prevent attacks or dismantle terrorist networks, would be lost. Moreover, giving detainees even the rudimentary information necessary to challenge their combatant designations could compromise sensitive intelligence, such as the identities of those who betrayed or took them into custody.

Third, against the risk of erroneous detention of the innocent must be weighed the possibility of erroneous release of the guilty. This is not speculative: the Department of Defense has recently revealed that even its own processes, which Petitioners contend are too restrictive, have resulted in

the release of individuals later found to have returned to the fight against us. See, *e.g.*, Lee A. Casey & David B. Rivkin, Jr., *The Facts About Guantanamo*, Wall. St. J., Feb. 16, 2004, at A6.

In a wartime legal framework, the normal risk calculus of the criminal justice system is upended: we have always erred and should continue to err on the side of ensuring that our adversaries are incapacitated so that our nation can achieve military victory as swiftly as possible, thereby saving lives and preserving civil liberties. The judicially-ordered release of individuals who later launch mass-casualty attacks against the United States, its civilian population, or critical infrastructure could be catastrophic.

Finally, there is no reason to believe a ruling in favor of Petitioners could be limited to those held at Guantánamo. If it could, it would be largely meaningless, as the military could simply transfer Petitioners and the other Guantánamo detainees to another U.S. facility abroad. If it could not, then this Court must confront the possibility that each of the tens of thousands of prisoners being held by U.S. forces at bases under our control in Iraq, in Afghanistan, in Diego Garcia, and elsewhere, including top al Qaeda leaders such as Ramzi Binalshibh, Abu Zubaydah, and Khalid Sheikh Mohammed, will soon stop talking to their interrogators and become civil plaintiffs in our courts. Indeed, even if the Court believed its holding limited to Guantánamo, the militant jihadists, Baathists, Taliban, and al Qaeda we have in custody elsewhere and their supporters in the American and international bar would likely not agree: any recognition of jurisdiction for enemy combatants held abroad could prompt a disastrous floodtide of litigation against our military and civilian leaders by captured enemies. It is difficult to imagine a more effective way to impair the war on terrorism and simultaneously undermine confidence in the federal courts.

3. Protection Of The Rights Of Military Detainees Occurs Through Diplomatic And Sovereign-To-Sovereign Negotiations.

To say there is no judicial remedy for foreign enemy combatant detainees who might be held in error does not mean there is no remedy. On the contrary, there is a time-tested, effective remedy for precisely such situations that is already well underway with respect to the Guantánamo detainees. Under the international laws of armed conflict, protection of the rights of captured fighters under the Geneva Conventions and otherwise occurs through diplomatic and sovereign-to-sovereign negotiations and not through private rights of action in court. See *generally* Detter, *supra*, 326-36; *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978); Geneva Convention Relative to the Treatment of Prisoners of War, *supra*, art. 132, 6 U.S.T. 3420, 75 U.N.T.S. at 238.

Such negotiations have been underway for many months with respect to the Guantánamo detainees and have resulted in the release or repatriation of numerous detainees. See, *e.g.*, Press Release, U.S. Dep't of Def., Transfer of Guantánamo Detainees Complete (Nov. 24, 2003), *available at* http://www.dod.mil/releases/2003/nr20031124-0685.html. These discussions are a far more efficient and effective means of resolving disputes over the status of particular detainees than judicial proceedings. Direct dealings between governments can include the sharing and mutual evaluation of sensitive intelligence information, in-person visits to detainees by diplomatic officials, negotiations over terms of release or repatriation, safeguards against future hostile activity of those released, and appropriate consideration by U.S. officials of the conduct of other nations in their treatment of U.S. persons. Whether captured fighters are citizens of hostile nations, friendly nations, or nations that fall into an ambiguous middle ground, their interests are best protected in the only way recognized under the international law of armed conflict and centuries of practice: by their own governments.

III. INTERNATIONAL LAW DOES NOT FURNISH A BASIS FOR FINDING JURISDICTION OVER CAPTURED ENEMIES HELD ABROAD.

Petitioners claim that "international legal norms" require a finding of jurisdiction in this case, but their analysis is exactly backwards. No binding international obligation requires the United States to open its courts to foreigners—much less unlawful combatants—detained overseas in times of war. Instead, Petitioners rely on a wildly broad conception of "international norms" applicable to U.S. legal disputes and of this Court's role in "conforming" U.S. law to a "global common law." That conception, if accepted, would enmesh this Court directly into the most contested diplomatic disputes this nation confronts, prematurely require resolution of a range of controversial claims regarding international legal obligations that the lower courts have rejected, and place this Court at odds with Congress and the Executive.

Petitioners Al Odah et al. claim to find an international law "right to an impartial tribunal" in the "universal consensus of the international community." Al Odah Br. at 40. Petitioners Rasul et al. find an international legal obligation to prevent "prolonged, arbitrary detention." Rasul Br. at 23. Petitioners contend that these obligations bind courts of the United States to hear their claims. Al Odah Br. at 25; Rasul Br. at 29. Both invoke the interpretative canon of *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), which states that U.S. statutes should be interpreted not to violate international legal obligations.

Each element of Petitioners' reasoning is profoundly wrong. Most basically, no principle of binding international law requires a nation's domestic courts to entertain claims by foreign fighters detained overseas during wartime, and Petitioners can point to none. International law imposes obligations on states. It governs dealings between and among sovereigns. A state structures its internal affairs as it wishes to discharge an international obligation, see generally

Restatement (Third) of the Foreign Relations Law § 711, cmt. h (1987), and the United States has clearly not sought to discharge its obligations to the detainees through involvement of Article III courts. Instead, the President has determined that military officers will discharge all international law obligations with respect to the Guantánamo detainees. Congress has not sought to unsettle the President's resolution of this diplomatic issue. Nor is there any basis for this Court to do so.

Petitioners attempt to avoid the clear implication of this black letter law and undisputed assertion of Presidential authority through three unsupportable strategems. One is to overstate the scope and sources of "international law" that bind the United States. Another is to conflate obligations of review that may arise from truly binding international law with obligations enforceable in Article III courts. The third is to invite this Court to import "global common law" into ambiguous U.S. statutes. All create severe separation of powers difficulties.

1. Petitioners rely heavily upon a variety of pronouncements by foreigners and foreign entities that have absolutely no binding effect on the United States, much less any applicability to Article III courts. Various statements by officers of foreign courts that are without jurisdiction over the United States; General Assembly resolutions; conventions, declarations, or treaties to which the United States has not assented or agreed; "sharp criticism from the international community" (Rasul Br. 27); and aspirational claims by law professors—all these are simply not sources of international law that bind the United States. See generally *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003) (and collecting cases).

Petitioners do not directly argue that the sources they cite are binding international legal principles recognized by and incorporated into U.S. law, nor could they. United Nations Resolutions, such as the U.N. Declaration of Human Rights

(Rasul Br. at 24-25 & n.27) "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." *Flores*, 343 F.3d at 165; see also *Haitian Refugee Ctr.* v. *Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987) (Universal Declaration "merely a non-binding resolution"); *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999). These principles apply even more strongly to exclude from customary or binding international law the comments of the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and by various U.N. working groups such as the Human Rights Committee (Rasul Br. 26, 28 & nn.31, 36).[12]

Petitioners also rely on decisions from the European Court of Human Rights and other international tribunals. But the European Court is a regional court that is not "empowered to create binding norms of customary international law." *Flores*, 343 F.3d at 169. It is only empowered to "interpret[]" and "appl[y]" the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 ("European Convention"), an instrument applicable only to its regional State parties—not to create new rules of customary international law. Similarly, decisions of the Inter-American Commission on Human Rights are only precatory, and the Executive has acted to ensure that the United States is not bound by them. See *Garza* v. *Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *Roach* v. *Aiken*, 781 F.2d 379, 380-81 (4th Cir. 1986) (per curiam).

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[12] "General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue . . . ." *Flores*, 343 F.3d at 165 (collecting sources).

Petitioners and supporting *amici* also rely on extralegal sources such as treaties which the United States has neither signed nor ratified, including the American Declaration of the Rights and Duties of Man (Rasul Br. 25 & n.29) and the American Convention on Human Rights (Al Odah Cert. Pet. at 24 n.23). The American Convention creates no rights binding upon or enforceable in U.S. courts.[13] And the American Declaration, promulgated by the Organization of American States "is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations." *Garza*, 253 F.3d at 925. Petitioners similarly rely on comments, statements and speeches by foreign officials, including U.N. officials, and law professors. See Rasul Br. at 24 & n.24, 26, 28 & nn.31, 36. But such comments hardly constitute customary international law that binds the United States. See *United States* v. *Yousef*, 327 F.3d 56, 102 (2d Cir.), *cert. denied*, 124 S. Ct. 353 (2003).

These "international norms" are, at base, not sources of law at all but instead components of a diplomatic and political effort of the adversaries and erstwhile allies of the U.S. to make this nation's sovereign power subject to a highly contested conception of "international norms," international institutions, and "multilateralism." Indeed, this case can be viewed as one battle between those who invoke "international norms" and multilateralism to constrain the United States and those who believe that Article II empowers the Executive to defend the nation subject only to legal constraints applicable and deemed relevant by *U.S.* law, including the Constitution and those international legal obligations that U.S. law incorporates. That is, Petitioners rely upon and seek to have this Court endorse an essentially political position that is

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[13] *See Flores*, 343 F.3d at 164; *Garza*, 253 F.3d at 925; *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring).

adverse to the interests of this nation as asserted by the Executive. Cf. *Printz* v. *United States*, 521 U.S. 898, 921 n.11 (1997) (holding "such comparative analysis [with international decisions] inappropriate to the task of interpreting a constitution"). Whatever general guidance foreign determinations may provide for purely domestic legal issues, cf. *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2483 (2003), they cannot bind Article III courts with respect to matters subject to the core treaty, diplomatic, and war powers committed to other branches. See U.S. Const. art. I, § 8; *id.* art. II, §§ 1, 2.

2. Very significant separation of powers difficulties also attend Petitioners' reliance upon two sources of international law that can in fact bind the United States but which are not judicially enforceable. The first, the International Covenant on Civil and Political Rights ("ICCPR"), is a non-self-executing treaty that does not give rise to legal rights that can be enforced in U.S. courts.[14] Congress has enacted no implementing legislation for this treaty that could establish such rights, and for this Court to recast the treaty as providing such rights would represent a severe abrogation of Article I and Article II powers. In any event, the ICCPR is clearly inapplicable to Petitioners. The ICCPR has been interpreted by United States courts not to govern situations of war detention, and ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory.[15]

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[14] *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d at 168; *Castellano-Chacon* v. *I.N.S.*, 341 F.3d 533, 544 (6th Cir. 2003); *United States* v. *Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002); *United State ex rel. Perez* v. *Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir. 2002), *cert. denied*, 537 U.S. 869 (2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994).

[15] *See* ICCPR, Dec. 19, 1966, art. 2, 999 U.N.T.S. 171, 173 ("[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant") (emphasis added). In addition, treaties "normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Petitioners also rely upon the law of war (Rasul Br. 27 & nn.33-35), which inherently raises separations of powers concerns. Even if it were appropriate for Article III courts to review the military's wartime detention policies under these standards, the Department of Defense has conformed its policies to applicable standards established by the law of war, including that established by the Geneva Conventions. See Brief of Law Professors at 17-24. More importantly, however, the nature of the international legal obligations at issue preclude such review by an Article III court. The Geneva Conventions impose duties and create rights between sovereigns, not between individuals and sovereigns such as may be enforced by private suits. *United States* v. *Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("Under international law it is the contracting foreign government that has the right to complain about a violation."). They are non-self-executing treaties, and no domestic legislation implements those treaties to provide for rights enforceable in U.S. courts. See *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978).[16] Obligations under the Geneva Convention are "matter[s] for the executive and legislative departments," not for the judiciary to enforce. *Federal Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 203 (1946). Indeed, the limitation of individual rights created by such treaties is a deliberate

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[16] Absent domestic legislation explicitly providing for a private right of action, U.S. treaties and international agreements are normally irrelevant to interpreting a plaintiffs' rights in U.S. courts. See *Restatement (Third) of Foreign Relations Law* § 111(3) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority.").

decision not only of the Executive and Congress, but also of other nations that enter those treaties upon the same understanding of their limited scope. See, *e.g.*, Senate Comm. on Foreign Relations, *International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992), *reprinted in* 31 I.L.M. 645, 652, 657, 659 (1992).

3. The most significant separation of powers difficulty created by Petitioners' reliance on international "norms" arises from their invocation of *The Charming Betsy* canon, which they claim should compel the Court to render a decision in conformity with the various "international norms" they note. See Rasul Br. at 29; Al Odah Br. at 24-25. But *The Charming Betsy* in fact counsels against recognizing habeas jurisdiction: Petitioners would transform a principle designed to enforce separation of powers into a mandate to have Article III courts interfere widely and inappropriately in determinations committed to Congress and the Executive.

In *The Charming Betsy*, the Court indicated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. (2 Cranch) at 118. The decision is grounded in the presumption that Congress would not seek to breach binding international obligations of the United States unless it made such intent clear. See *Restatement (Third) of Foreign Relations Law* § 115, cmt. a ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States . . ."). More broadly, the canon reflects separation of powers concerns by ensuring the pre-eminence of Congress in determining when and whether U.S. law will conform to international legal requirements, and requiring a clear expression of Congressional intent before settling on an interpretation that could interfere with the Executive's conduct of foreign policy. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers*, 86 Geo. L.J. 479 (1998).

The canon thus limits the Court's power relative to other branches whenever it is called upon to undertake interpretations that may touch upon international legal obligations. Modern cases have focused on such separation of powers underpinnings. See, *e.g.*, *Edward J. De Bartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 38 (1997). For example, this Court has invoked the *Charming Betsy* canon to avoid extraterritorial application of an Act that could interfere with Executive determinations amidst "[t]he presence of . . . highly charged international circumstances." *McCulloch*, 372 U.S. at 21. It later characterized *McCulloch* as "the Court declin[ing] to read [an Act] so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations." *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979).

Yet Petitioners and supporting *amici* seek to have the Court employ the *Charming Betsy* canon as authorization to apply a "global common law" derived from international "norms" that do not otherwise bind the United States or entitle claimants to enforce rights through Article III courts. See Brief of International Law and Jurisdiction Professors at 11. Petitioners thus invoke the decision to have the Court *conform* its decision to general international norms in contravention of contrary determinations by the political branches. This would turn the decision on its head. Finding no jurisdiction in this case would not "violate the law of nations," and thus the language and canon of *The Charming Betsy* assist Petitioners not one whit. As shown above, there is simply no principle of customary international law that requires wartime detainees to be granted access to a nation's courts. If, contrary to the decision's language, *The Charming Betsy* were read as a command to align U.S. law with non-binding international norms, then the decision would become

not a prudential rule of construction, but rather a grant of sweeping common law or legislative-like power to the federal judiciary. *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), precluded such a judicial role even for federal domestic matters. Any Article III federal common lawmaking power derived from international norms would trench upon not only the Executive's and Congress' treaty power, but also the Executive's power to conduct foreign affairs and—in wartime—to function effectively as Commander-in-Chief. For these reasons, courts have overwhelmingly declined to apply the *Charming Betsy* canon in the manner suggested by Petitioners and have instead recognized the limitations on judicial power in matters of foreign affairs. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438-43 (1989); *Princz* v. *Federal Republic of Germany*, 26 F.3d at 1166 (D.C. Cir. 1994).[17]

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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[17] *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998). Even prior to *Erie*, this Court held that customary international law not codified in a statute or treaty did not present a federal question or "arise under" federal law. *See New York Life Ins. Co.* v. *Hendren*, 92 U.S. 92 Otto.) 286, 286-87 (1875); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886). The Court in *Erie*, in turn, left the federal courts with only a limited form of interstitial federal common law, to be applied only to further "a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 89 (1994).

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March 3, 2004

APPENDIX A

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Miguel A. Estrada
David Frum
Eric George
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